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# INTERNATIONAL COUNTERTRADE

## Draft Legal Guide on International Countertrade Transactions

## Report of the Secretary-General

## Addendum

## DRAFT ILLUSTRATIVE PROVISIONS

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## INTRODUCTION

1. The Working Group on International Payments decided that the Legal Guide should include a limited number of illustrative provisions (A/CN.9/357, paras. 93 and 94). The Working Group expressed support for the selection made in document A/CN.9/WG.IV/WP.51//Add.7* of the issues to which illustrative provisions should be added. The present document contains a revision of illustrative provisions published in document A/CN.9/WG.IV/WP.51//Add.7*.

2. It is suggested that the illustrative provisions be included in the Legal Guide as footnotes.

3. As noted in document A/CN.9/WG.IV/WP.51//Add.7*, paragraph 2, the preparation of the illustrative provisions has been influenced by the following considerations. Firstly, the draft Legal Guide discusses possible contractual solutions in such a way that the reader can derive from the draft chapters guidance to drafting clauses for a countertrade agreement. Secondly, illustrative provisions must of necessity be drafted in a general manner and may therefore not take into account the actual circumstances in a given countertrade transaction. These considerations reduce the number of illustrative provisions that can usefully be added to the Legal Guide.

4. In the Working Group it was suggested that in each illustrative provision reference should be made to the warning set out in chapter I, "Introduction", paragraph 13, that illustrative provisions should not necessarily be regarded as appropriate models for inclusion in individual agreements (A/CN.9/357, para. 93). In order to implement the suggestion, it is proposed that the following title be given to each set of illustrative provisions placed at the end of a given chapter: "Illustrative provisions to chapter .. (care should be taken in using them, see 'Introduction', paragraph 13)".

## DRAFT ILLUSTRATIVE PROVISIONS

### Chapter VI. TYPE, QUALITY AND QUANTITY OF GOODS

[Editorial note: The following footnote to paragraph 25, except for the underlined modifications, appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter V, Type, quality and quantity of goods, Footnote to paragraph 13."]

Footnote to paragraph 25

Assuming that "Y Company" is committed to purchase goods from "X Company", the clause in the countertrade agreement may contain the following elements:

"When X Company makes, pursuant to the countertrade agreement, an offer for the conclusion of a supply contract, the goods offered for purchase must:

(a) be fit for the purposes for which goods of the same description would ordinarily be used;

(b) be fit for any particular purpose expressly or impliedly made known to X Company at the time of the conclusion of the countertrade agreement;

(c) possess qualities consistent with those of the sample or model presented by X Company to Y Company;

(d) be contained or packaged in the manner usual for such goods or, where no such usual manner has been established, in a manner adequate to preserve and protect the goods."

(The clause is modelled on article 35 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)).

## Chapter VII. PRICING OF GOODS

[Editorial note: The following footnote to paragraph 48, except for the underlined addition, appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter VI, Pricing of goods, Footnote to paragraph 37."]

Footnote to paragraph 48

Assuming that the currency of payment is the Austrian Schilling and that the reference currency is the Swiss Franc, the clause may read as follows:

"If, on the date of actual payment, the exchange rate between the Austrian Schilling and the Swiss Franc is at variance from the exchange rate ... [specify exchange rate prevailing at a particular place] as it was on the date of conclusion of the countertrade agreement by more than ... [e.g, five per cent, or some other percentage specified by the parties], the price in Austrian Schillings shall be increased or decreased so that that price, as converted into Swiss Francs, would remain unchanged from the price as expressed in Swiss Francs on the date of conclusion of the countertrade agreement." (It should be noted that the foregoing clause may lead to an unintended and unsuitable result if the applicable exchange rate were to be set by an administrative decision independent of events in the currency market (see paragraph 49)).

## Chapter VIII. PARTICIPATION OF THIRD PARTIES

[Editorial note: The following footnotes to paragraphs 12, 18 and 23 are revisions of the footnotes to paragraphs 10, 16 and 21, which appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter VIII, Participation of third parties". The revisions are underlined. The footnote to paragraph 18, third sentence, is new.]

Footnote to paragraph 12

Assuming that "Y Company" is the party originally committed to purchase, the clause may read as follows:

"Y Company is authorized to engage a third-party purchaser to make the purchases necessary to fulfil the countertrade commitment." (To this clause, the parties may add a stipulation discussed in

paragraph 18 indicating whether or not, after the engagement of the third party, the party originally committed continues to be liable for the fulfilment of the countertrade commitment.)

Footnote to paragraph 18, third sentence

[new footnote] Assuming that "Y Company" is the party originally committed to purchase and "X Company" is the supplier, the clause in the countertrade agreement may read as follows:

"The fact that Y Company engages a third party to make the purchases necessary to fulfil the countertrade commitment and that the third party makes a commitment to X Company to make those purchases does not release Y Company from liability for a failure to fulfil the countertrade commitment.

Footnote to paragraph 18, sixth sentence

Assuming that "Y Company" is the party originally committed to purchase, and "X Company" is the supplier, the clause in the countertrade agreement may read as follows:

"Y Company will be released from liability for fulfilment of the countertrade commitment when, upon the engagement of a third-party purchaser by Y Company, the commitment of Y Company to purchase goods from X Company is transferred to the third-party purchaser. [The transfer includes the obligation to pay the liquidated damages in the case of a failure to make the purchases.] For such a transfer to be effective, Y Company, X Company and the third-party purchaser must agree to the transfer."

Footnote to paragraph 18, seventh sentence

Assuming that "Y Company" is the party originally committed to purchase, and "X Company" is the supplier, the clause in the countertrade agreement may read as follows:

"Y Company undertakes to release X Company from liability for fulfilment of the countertrade commitment when, upon the engagement of a third-party purchaser by Y Company, X Company and the third-party purchaser conclude an agreement whereby the third-party assumes a commitment to make the purchases necessary to fulfil the countertrade commitment of Y Company."

If the foregoing provision is included in the countertrade agreement, the actual release of X Company from liability for fulfilment of the countertrade commitment can be expressed in the following form:

"X Company, having agreed with Z Company (third-party purchaser) that Z Company assumes the commitment to make the purchases necessary to fulfil the countertrade commitment of Y Company, consents to the release of Y Company from the liability for the fulfilment of the countertrade commitment. The release of Y Company becomes effective when the agreement between X Company and Z Company becomes effective."

Footnote to paragraph 23

Assuming that "Z Company" is the third-party purchaser, "Y Company" is the party originally committed to purchase, and "X Company" is the supplier, the clause in the contract between Y Company and Z Company may read as follows:

"Z Company shall conclude with X Company an agreement in which Z Company will agree to make the purchases necessary to fulfil the countertrade commitment set forth in the countertrade agreement between Y Company and X Company, a copy of which is attached to this contract. Z Company agrees to be bound by all the terms and conditions of that countertrade agreement, and in particular Z Company agrees to pay the liquidated damages stipulated in the countertrade agreement in the event Z Company fails to make the purchases necessary to fulfil the countertrade commitment."

## Chapter X. RESTRICTIONS ON RESALE OF GOODS

[Editorial note: The following footnote to paragraph 10 appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter X. Restrictions on resale of goods, Footnote to paragraph 9." No substantive change to the text of the footnote has been made.]

Footnote to paragraph 10

Assuming that "Y Company" is the party purchasing goods pursuant to the countertrade agreement and that "X Company" is the supplier, the clause may read as follows:

"Y Company must inform X Company

[alternative A:] of the resale of those goods; the information shall be given within ... days after the conclusion of the resale contract.

[alternative B:] of the negotiations for the resale of the countertrade goods; Y Company shall give X Company [... days] [sufficient time] to make any observations or suggestions on the intended resale, and Y Company shall refrain from concluding the resale contract under negotiation before the expiry of that time period.

The information to be given must indicate ... [include some or all of the following: country, region within a country, or city to which the countertrade goods are to be shipped; place of business of the person to whom the goods are being resold; resale price; whether the countertrade goods have been re-marked or repackaged prior to resale and, if so, what packaging or marking has been used.]"

## Chapter XI. LIQUIDATED DAMAGES AND PENALTY CLAUSES

[Editorial note: The following footnotes to paragraphs 6, 12 and 26 of draft chapter XI appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter XI. Liquidated damages and penalty clauses" as footnotes to paragraphs 5, 12 and 22. The modifications of the footnotes are underlined].

Footnote to paragraph 6

Assuming that "X Company" is the supplier, "Y Company" is the party committed to purchase, and the Austrian Schilling is the currency of payment, the clause may read as follows:

[For failure to purchase goods]

"(1) If Y Company fails to make the purchases necessary to fulfil the countertrade commitment before the expiry of the period stipulated for the fulfilment of the countertrade commitment, Y Company will be obligated to pay to X Company an amount in Austrian Schillings equivalent to ... per cent of the unfulfilled portion of the countertrade commitment. Upon payment of that amount, Y Company will be released from the portion of the unfulfilled countertrade commitment for which the agreed sum was claimed.

(2) To the extent that the failure by Y Company results from a failure by X Company to make goods available in conformity with this countertrade agreement, paragraph (1) will not apply."

[For failure to supply goods]

"(1) If X Company fails to make the goods available for the fulfilment of the countertrade commitment before the expiry of the period stipulated for the fulfilment of the countertrade commitment, X Company will be obligated to pay to Y Company an amount in Austrian Schillings equivalent to ... per cent of the unfulfilled portion of the countertrade commitment. Upon payment of that amount, X Company will be released from the portion of the unfulfilled countertrade commitment for which the agreed sum was claimed.

(2) To the extent that the failure by X Company results from a failure by Y Company to fulfil its obligations under this countertrade agreement, paragraph (1) will not apply."

Footnote to paragraph 12 (provision that could be added to any liquidated damages or penalty clause)

"No damages are recoverable in addition to the agreed sum for the failure for which the agreed sum is payable."

Footnote to paragraph 26 (provision that could be added to any liquidated damages or penalty clause)

Assuming that "X Company" is the beneficiary of the clause and "Y Company" is the party obligated to pay the agreed sum, the stipulation may read as follows:

"If payment of the agreed sum becomes due in accordance with paragraph (1), X Company has the right to deduct the agreed sum from funds of Y Company held by X Company or to set off the claim for the agreed sum against a countervailing claim by Y Company against X Company. [A deduction or setoff is permitted only if the funds held by X Company, or the claim by Y Company, arise from the following contracts ...]"

## Chapter XIII. FAILURE TO COMPLETE COUNTERTRADE TRANSACTION

[Editorial note: The following footnotes to paragraphs 7, 21, 23, 44 and 50 appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter XIII. Failure to complete countertrade transaction" as footnotes to paragraphs 6, 22, 24, 43 and 49. Slight editorial changes are underlined.]

Footnote to paragraph 7

Assuming that "Y Company" is the party committed to purchase and that "X Company" is the supplier, the clause may read as follows:

> "If X Company fails to accept a purchase order made by Y Company in accordance with this countertrade agreement [or a purchase order made by a third-party purchaser engaged by Y Company pursuant to this countertrade agreement], Y Company is entitled to declare the amount of the outstanding countertrade commitment reduced by the amount of the purchase order that was not accepted."

When it is agreed that Y Company must give an additional period to X Company, the following clause may be added to the previous one:

> In order to avail itself of the right to declare the outstanding countertrade commitment reduced, Y Company must give X Company written notice specifying that the failure to accept the purchase order constituted a breach of the countertrade commitment and that the outstanding countertrade commitment will be reduced by the amount of the unaccepted purchase order if X Company does not make the goods available within the additional period of [e.g., 30] days."

Footnote to paragraph 21

Assuming that "Y Company" is the party committed to purchase and that "X Company" is the supplier, the clause may read as follows:

> "(1) [Y Company] [X Company] is exempt from the payment of damages, or of an agreed sum, in respect of a failure to fulfil its obligations under the countertrade agreement if that party proves that the failure was due to a physical or legal impediment beyond its control and that the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the countertrade agreement or to have avoided or overcome it or its consequences.
>
> (2) The period for the fulfilment of the countertrade commitment will be extended by a period of time corresponding to the duration of the impediment. If the impediment lasts longer than [e.g., six months], [the party against which the impediment is claimed] [either party] may terminate the countertrade agreement by written notice."

Footnote to paragraph 23

> [General definition of exempting impediment followed by illustrative or exhaustive list]
>
> "(1) [Same text as in para. (1) of the illustrative provision to paragraph 21]

(2) [Illustrative list:] The following are examples of events that are to be regarded as exempting impediments, provided that those events satisfy the criteria set forth in paragraph (1): ... . [Exhaustive list:] Only the following events are to be regarded as exempting impediments, provided that those events satisfy the criteria set forth in paragraph (1)."

Footnote to paragraph 44

Assuming that "Y Company" is the exporter (counter-importer) and that "X Company" is the importer (counter-exporter), the clause would read as follows:

"A failure by Y Company to purchase goods pursuant to this countertrade agreement does not entitle X Company to suspend or withhold payment due by X Company to Y Company under the contract for the supply of ... ."

Footnote to paragraph 50, first sentence

"If a contract for the supply of goods in one direction is terminated, neither party is entitled, irrespective of the cause for the termination, to suspend conclusion of contracts in the other direction or to suspend or withhold performance of obligations under concluded contracts in the other direction."

Footnote to paragraph 50, second sentence

"If a contract for the supply of goods by X Company to Y Company concluded pursuant to this countertrade agreement is terminated, neither party is entitled, irrespective of the cause for the termination, to suspend or withhold performance under the contract for the supply of goods by Y Company to X Company."

## Chapter XIV. CHOICE OF LAW

[Editorial note: The footnotes to paragraph 21 (to the second sentence and the fourth sentence) appeared in document A/CN.9/WG.IV/WP.51/Add.7* as footnotes to paragraph 20. The modifications in the text of the footnote to paragraph 21, second sentence, are underlined. The footnotes to paragraphs 15 and 24 are new.]

Footnote to paragraph 15

[new footnote] "This countertrade agreement as well as the contracts entered into pursuant to it are to be governed by the rules of (specify the set of rules such as the United Nations Convention on Contracts for the International Sale of Goods)."

Footnote to paragraph 21, second sentence (illustrative provision for the countertrade agreement and for a supply contract)

"This ... (specify countertrade agreement or supply contract) is to be governed by the law of ... (specify a country or a particular territorial unit) [as in force on ... (specify date the countertrade agreement or the supply contract is entered into)]. [This designation refers to the substantive law of (specify the same country or territorial unit as above) and not to its conflict-of-laws rules.]"

Footnote to paragraph 21, fourth sentence (illustrative provision for the countertrade agreement and for a supply contract)

[Same as in footnote to paragraph 21, second sentence, with the addition, after the first sentence, of the following:] "The selected law governs in particular the formation of and validity of the contract and the consequences of its invalidity."

Footnote to paragraph 24

[new footnote] "This countertrade agreement is to be governed by the law of ... (specify a country or a particular territorial unit) [as in force on ... (specify date the countertrade agreement or the supply contract is entered into)]. The contracts concluded pursuant to this countertrade agreement are to be governed by (specify the same law as in the previous sentence or a different law). [The rules of private international law of ... (specify the same country or territorial unit as as in the previous two sentences) do not apply.]" (For the discussion of the question whether the same national law or different national laws should be chosen, see paragraphs 25 to 29.)

## Chapter XV. SETTLEMENT OF DISPUTES

The model clauses recommended in the UNCITRAL Conciliation Rules and in the UNCITRAL Arbitration Rules are incorporated in footnotes to paragraphs 14 and 30 of chapter XV (A/CN.9/362/Add.15). In order to implement the decision of the Working Group on International Payments that the Legal Guide should indicate that there exist a number of different conciliation and arbitration rules (A/CN.9/357, para. 101), the following modifications are suggested to draft chapter XV (A/CN.9/362/Add.15):

In paragraph 14, last sentence, delete the words "prepared by an international organization" and add at the end of the paragraph the following sentence: "Other sets of conciliation rules have been prepared by various international and national organizations."

At the end of footnote 1, add the following sentence: "The use of other conciliation rules may also be appropriate in a given case."

In paragraph 30, second sentence, delete the words: "such as the one accompanying the UNCITRAL Arbitration Rules".

At the end of footnote 4, add the following sentence: "The use of other arbitration rules may also be appropriate in a given case."

At the beginning of footnote 5, add the following text: "A number of model arbitration clauses exist. Generally, it is advisable to use the model clause that pertains to the chosen arbitration rules."